

No. 91-781

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE UNITED STATES OF AMERICA,
Petitioner,
v.

A PARCEL OF LAND, BUILDINGS, APPURTENANCES AND
IMPROVEMENTS KNOWN AS 92 BUENA VISTA AVENUE,
RUMSON, NEW JERSEY, and BETH ANN GOODWIN,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION
AND THE MORTGAGE BANKERS ASSOCIATION
OF AMERICA AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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INTEREST OF THE AMICI CURIAE

The American Land Title Association (ALTA) and the Mortgage Bankers Association of America (MBAA) jointly submit this brief as amici curiae in support of respondent.¹ The ALTA is the national trade association of the land title industry. The ALTA has approximately 2,300 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facili-

¹ The filing of this amicus brief is accompanied by the written consent of the Solicitor General on behalf of the United States and of counsel for the respondent Beth Ann Goodwin.

tate the safe, certain, and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The MBAA is the primary national trade association devoted exclusively to the field of mortgage and real estate finance. Mortgage banking firms, which make up the largest portion of the total MBAA membership of 2,600 corporations, engage directly in originating, financing, selling and servicing mortgages.² In 1990, the latest year for which data is available, mortgage bankers originated more than \$102 billion in single family mortgages and serviced in excess of \$900 billion in single-family mortgages. MBAA members originate and service up to 80 percent of the mortgages used to finance home purchases through programs designed by Congress to encourage home ownership by facilitating low down payment loans to home buyers. In 1990, the MBAA member origination volume in these programs (the FHA mortgage insurance program of the Department of Housing and Urban Development and the home loan guaranty program of the Department of Veterans Affairs) was approximately \$45 billion.

Amici are interested in this case because of their concern that the rights of innocent mortgage lenders and other bona fide purchasers for value be adequately protected in forfeiture proceedings. Mortgage loans—i.e., loans in which the borrower's obligation to pay the principal amount of the loan and the interest due on the loan is secured by a lien on real estate owned by the borrower—are an important means of providing credit in the

² "Origination" refers to the creation of the mortgage by negotiating, arranging, and funding the loan to home buyers. "Servicing" refers to collecting payments on existing loans, monitoring the payment of real property taxes and other charges to protect the priority of the mortgage lien, and facilitating the realization of the security in the event of nonpayment.

United States. Loans worth hundreds of billions of dollars are secured by mortgages on residential and commercial real estate. Furthermore, mortgage loans constitute an integral part of the process by which most real estate in the United States is bought and sold. In a typical real estate transaction, the buyer borrows a substantial portion of the purchase price from a mortgage lender, and in return grants a first lien on the real estate to the mortgage lender as security for its loan. The security provided to the lender by its mortgage lien is a vital element of the loan transaction. The security provided by the mortgage lien enables borrowers to obtain mortgage loans on more favorable terms and conditions than would be the case in the absence of an enforceable mortgage lien.³ In particular, any modification of the essential terms of home mortgages, which typically are secured only by the principal residence of the mortgagor, would have serious adverse affects on the nationwide residential mortgage markets and ultimately on future home buyers.

From the perspective of mortgage lenders, therefore, the security interest represented by the mortgage lien is an important and valuable interest—and one that should be protected in a forfeiture proceeding. In this case, however, the United States takes the position that the relation-back doctrine, which provides that the interest of the United States in property subject to forfeiture relates back to the date of the first illegal activity giving rise to the forfeiture, cuts off any subsequently-acquired rights in the property, including those claimed by innocent mortgage lenders who acquired their property as bona fide purchasers in good faith for value. Consequently, the

³ Federal regulations promulgated by the Department of Housing and Urban Development (HUD) governing the secondary mortgage market require that mortgage loans insured by HUD must be secured by a lien on the real property securing the loan. See 24 C.F.R. § 340.25 (1991). This is simply one illustration of the important role that mortgage liens play in the real estate market.

position taken by the United States would leave innocent mortgage lenders without any statutory protection in civil forfeiture proceedings in which the lien attached after the commencement of the illegal activity giving rise to forfeiture. Other innocent bona fide purchasers for value would similarly be denied statutory protection as innocent owners. Amici believe this result is contrary to Congress's intent when it established statutory protection for innocent owners in civil forfeiture proceedings.

SUMMARY OF ARGUMENT

Congress intended the civil forfeiture innocent owner provisions of statutes such as 21 U.S.C. § 881(a)(6) to protect innocent bona fide purchasers for value who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture. Both the statutory language and the legislative history of 21 U.S.C. § 881(a)(6) demonstrate that Congress intended to protect such innocent owners, and did not intend the relation-back doctrine to defeat the rights of such innocent owners. The remission and mitigation procedures of the Department of Justice, which are considered a matter of administrative grace and are not subject to judicial review, are not a satisfactory substitute for the statutory protection provided to innocent owners, and Congress did not intend these procedures to be the only remedy available to innocent bona fide purchasers for value who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture. Finally, the interpretation of the relation-back doctrine advanced by the United States violates the due process clause of the Fifth Amendment.

ARGUMENT

I. INNOCENT BONA FIDE PURCHASERS FOR VALUE WHO ACQUIRED THEIR INTERESTS IN THE PROPERTY SUBSEQUENT TO THE OCCURRENCE OF THE ILLEGAL ACTIVITY GIVING RISE TO THE FORFEITURE CAN BE STATUTORY INNOCENT OWNERS UNDER 21 U.S.C. § 881(a)(6).

The question on which this Court granted certiorari is whether a donee can be an innocent owner within the meaning of 21 U.S.C. § 881(a)(6). That question, however, implicates a broader and more significant issue—whether the relation-back doctrine when applied in civil forfeiture proceedings defeats every innocent claimant who acquired his interest in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture, including innocent bona fide purchasers for value. The United States squarely takes the position that the innocent owner defense “can only be asserted by a claimant who acquired an interest in the property *before* commission of the act triggering the forfeiture.” U.S. Br. at 5 (emphasis in original). If this is so, then *all* claimants—not simply donees—who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture can never qualify as innocent owners.

Nor is the impact of this case limited to innocent owners asserting claims under 21 U.S.C. § 881(a)(6). The innocent owner provisions of all the principal civil forfeiture statutes are virtually identical. *Compare* 21 U.S.C. § 881(a)(6) (1988) *with* 21 U.S.C. § 881(a)(4) & (a)(7) (1988) *and* 18 U.S.C. § 981(a)(2) (1988) *and* 18 U.S.C. § 2254(a)(2) (1988). Consequently, the issue presented in this case is not limited to the innocent owner provision in 21 U.S.C. § 881(a)(6), but applies generally to innocent owner provisions in all civil forfeiture statutes.

The government attempts to avoid the broad impact of its position by maintaining that “[t]his case concerns

only the recipient of a gift of drug proceeds. It is therefore unnecessary for the Court to decide in this case whether a bona fide purchaser of drug proceeds could seek to block a forfeiture under Section 881(a)(6).” U.S. Br. at 36 n. 13. The government, however, does not explain how the Court can decide this case on the basis of the arguments advanced by the United States without necessarily deciding whether a subsequent bona fide purchaser is also precluded from claiming to be an innocent owner. As the court below noted, the civil forfeiture innocent owner provision does not appear to provide a basis for distinguishing between claimants who are bona fide purchasers and other types of claimants. See 937 F.2d at 101-02. Therefore, it is pure sophistry for the government to suggest that the Court’s holding will be limited to claimants who happen to be donees. If the Court adopts the rationale advanced by the United States, then all innocent claimants who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture—including mortgage lenders and other bona fide purchasers for value—will be foreclosed from claiming to be innocent owners.

A. Congress Provided Statutory Protection For Innocent Owners In Forfeiture Proceedings.

In the past fifteen years Congress has progressively expanded the scope of civil and criminal forfeiture, so that property involved in a broad range of illegal activity is now subject to forfeiture.⁴ Civil forfeiture provisions authorized in rem proceedings based on the legal fiction that the property itself is the wrongdoer. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974). Numerous statutes authorize civil forfeiture

⁴ See, e.g., Psychotropic Substances Act of 1978, Pub. L. No. 95-633, 92 Stat. 3768 (1978); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

proceedings. *E.g.*, 21 U.S.C. § 881 (1988); 18 U.S.C. § 981 (1988); 18 U.S.C. § 2254 (1988). In contrast, criminal forfeiture statutes authorize in personam proceedings, in which forfeiture occurs in connection with an individual’s conviction of a crime. Many statutes authorize criminal forfeiture proceedings. *E.g.*, 21 U.S.C. § 853 (1988); 18 U.S.C. § 1467 (1988); 18 U.S.C. § 1963 (1988); 18 U.S.C. § 2253 (1988).

Recognizing the severity of forfeiture at common law, Congress provided statutory protection for the rights of innocent owners in connection with both civil and criminal forfeiture proceedings. As the government noted, the language of the typical civil forfeiture innocent owner provision differs from the corresponding criminal forfeiture innocent owner provision. The typical civil forfeiture innocent owner provision states that “no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.” 21 U.S.C. § 881(a)(6) (1988); see also 18 U.S.C. § 981(a)(2) (1988); 18 U.S.C. § 2254(a)(2) (1988); 21 U.S.C. § 881(a)(7) (1988).⁵ In contrast, the typical

⁵ Courts have uniformly held that a mortgage lender or other lienholder qualifies as an innocent owner for purposes of 21 U.S.C. § 881. See *United States v. Federal National Mortgage Ass’n*, 946 F.2d 264, 266 (4th Cir. 1991); *In re Newport Savings & Loan Ass’n*, 928 F.2d 472, 476 (1st Cir. 1991); *United States v. Six Parcels of Real Property*, 920 F.2d 798, 799 (11th Cir. 1991); *United States v. One Urban Lot Located at 1 St. A-1, Valparaiso, Bayamon, P.R.*, 865 F.2d 427 (1st Cir. 1989); *In re Metmor Financial, Inc.*, 819 F.2d 446, 448 n.2 (4th Cir. 1987); *United States v. One Parcel of Property Located at Route 1, Box 137, Randolph, Chilton County, Alabama*, 743 F. Supp. 802, 807-08 (M.D. Ala. 1990); *United States v. One Single Family Residence Located at 6960 Miraflores Ave.*, 731 F. Supp. 1563 (S.D. Fla. 1990), appeal dismissed, 932 F.2d 1433 (11th Cir. 1991), cert. granted on other grounds, No. 91-767, 60 U.S.L.W. 3578 (Feb. 25, 1992); *United States v. Parcel of Real Property Known as 708-710 W. 9th Street*,

criminal forfeiture innocent owner provision enables a claimant, who can establish either that "the right, title, or interest [in the property subject to forfeiture] was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property," or that "the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section," to obtain an amendment of the forfeiture order exempting his property from forfeiture. See 21 U.S.C. § 853(n)(6) (1988); see also 18 U.S.C. § 982(b)(i) (1988); 18 U.S.C. § 1467(l)(6) (1988); 18 U.S.C. § 1963(l)(6) (1988); 18 U.S.C. § 2253(m)(6) (1988).

Congress also codified the relation-back doctrine in many forfeiture statutes, both civil, see 21 U.S.C. § 881(h) (1988); 18 U.S.C. § 981(f) (1988); 18 U.S.C. § 2254(g) (1988), and criminal. See 18 U.S.C. § 1467(b)

Erie, Pa., 715 F. Supp. 1323, 1326 (W.D. Pa.), vacated on other grounds sub nom. *United States v. Parcel of Real Property Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618 (3d Cir. 1989); *United States v. Real Property Constituting Approximately Fifty (50) Acres*, 703 F. Supp. 1306, 1312 (E.D. Tenn. 1988); *United States v. Real Property Titled in the Name of Shashin, Ltd.*, 680 F. Supp. 332, 334 (D. Hawaii 1987); *United States v. All That Tract and Parcel of Land: 2306 N. Effel Court*, 602 F. Supp. 307, 312 (N.D. Ga. 1985); *United States v. One Piece of Real Estate, Described in Part As: 1314 Whiterock and Improvements, San Antonio, Bexar County, Tex.*, 571 F. Supp. 723, 725 (W.D. Tex. 1983). But see *United States v. Premises and Real Prop. at 4492 S. Livonia Rd., Livonia, N.Y.*, 667 F. Supp. 79, 85 n.2 (W.D.N.Y. 1987) (court suggests in dicta that § 881(a)(7) innocent owner provision does not appear to cover interests held by a lienor or mortgagee), *aff'd on other grounds*, 889 F.2d 1258 (2d Cir. 1989). The innocent owner provision in 18 U.S.C. § 918(a)(2), which is otherwise identical to the innocent owner provision in 21 U.S.C. § 881, specifically refers to the interest of an "owner or lienholder." See 18 U.S.C. § 981(a)(2) (1988).

(1988); 18 U.S.C. § 1963(c) (1988); 18 U.S.C. § 2253(b) (1988); 21 U.S.C. § 853(c) (1988). The relation-back doctrine is a long-standing common-law doctrine that provides that the title of the United States in property subject to forfeiture relates back to the time of the illegal event giving rise to the forfeiture. See *Texas v. Donohue*, 302 U.S. 284 (1937); *Motlow v. State ex rel. Koeln*, 295 U.S. 97 (1935); *United States v. Stowell*, 133 U.S. 1, 16-17 (1890); *In re Thacher's Distilled Spirits*, 103 U.S. 679 (1880); *In re Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44 (1871); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814); *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 348-54 (1806).

It is clear that the criminal forfeiture innocent owner provision protects innocent mortgage lenders and other bona fide purchasers for value who acquired their interests in the property subsequent to the time of the illegal activity giving rise to the forfeiture, despite the relation-back doctrine. This is apparent from provisions such as 21 U.S.C. § 853(n)(6), which provide that the order of forfeiture "shall be amended" if the claimant establishes that it is a bona fide purchaser for value reasonably without cause to believe that the property was subject to forfeiture. It is also clear from provisions such as 21 U.S.C. § 853(c), which codifies the relation-back doctrine in criminal forfeiture proceedings. The criminal forfeiture relation-back provision specifically excepts from forfeiture the property of claimants who satisfy the bona fide purchaser standard of 21 U.S.C. § 853(n)(6). See 21 U.S.C. § 853(c) (1988); see also 18 U.S.C. § 1467(b) (1988); 18 U.S.C. § 1963(c) (1988); 18 U.S.C. § 2253(b) (1988). The United States agrees with this reading of the criminal forfeiture innocent owner provision. See U.S. Br. at 30-32.

Unlike the criminal forfeiture provision, the civil forfeiture relation-back provision does not refer directly to the civil forfeiture innocent owner provision. The typical civil forfeiture relation-back provision simply states:

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

21 U.S.C. § 881(h) (1988); *see also* 18 U.S.C. § 981(f) (1988); 18 U.S.C. § 2254(g) (1988). The United States considers this distinction between the civil and criminal innocent owner provision as one of the factors supporting its position in this case. *See* U.S. Br. at 12.

B. The Civil Forfeiture Innocent Owner Provision Protects Subsequent Bona Fide Purchasers For Value.

Despite the differences between the innocent owner provisions in criminal and civil forfeiture, a careful consideration of section 881(a)(6) and section 881(h) shows that Congress did indeed intend the civil forfeiture innocent owner provision to protect innocent bona fide purchasers for value who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture, notwithstanding the relation-back doctrine. Section 881(a)(6) was enacted in 1978, six years prior to the enactment of section 881(h) in 1984. *See* Psychotropic Substances Act of 1978, § 301, Pub. L. No. 95-633, 92 Stat. 3768 (1978); Comprehensive Crime Control Act of 1984, § 306, Pub. L. No. 98-473, 98 Stat. 1976 (1984). Section 881(a)(6) clearly excepts from forfeiture property "to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." *See* 21 U.S.C. § 881(a)(6) (1988). The plain language of section 881(a)(6) protects an innocent owner without regard to the time of the illegal activity giving rise to forfeiture. This broad construction of section 881(a)(6) is supported by the Joint Explanatory Statement that accompanied the legislation, which stated: "Finally it should be pointed out that no property would be forfeited under the Senate amendment to the extent

of the interest of any innocent owner of such property. The term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized." Joint Explanatory Statement of Titles II & III of the Psychotropic Substances Act of 1978, 124 Cong. Rec. S17647 (Oct. 7, 1978). There simply is no indication in either the statute or its legislative history that the protection for innocent owners was limited to claimants who acquired their property prior to the occurrence of the illegal activity giving rise to the forfeiture.

When subsection 881(h) was enacted six years later, there was no indication that its enactment was intended to limit the existing protection for innocent owners provided by section 881(a)(6). As the court of appeals below determined, section 881(h) vests title in the United States "in that property described in subsection (a)." Subsection 881(a) lists the property that "shall be subject to forfeiture," but obviously section 881(a)(6) excepts an innocent owner's property from forfeiture. Because of the language of section 881(a)(6), an innocent owner's property is not subject to forfeiture under subsection 881(a), and therefore the relation-back provision of section 881(h) does not apply to an innocent owner's property. As the court below reasoned, "If the property is exempted from forfeiture pursuant to an innocent owner defense and therefore is not forfeitable property under subsection (a), then section 881(h) does not apply to such property that is not subject to forfeiture." 937 F.2d at 102.

This construction of subsections 881(a) and 881(h) is buttressed by the statements of the proponents of the section 881(a)(6) innocent owner provision. The innocent owner language resulted from an amendment offered by Senators Nunn, Mathias and Wallop intended "to make it clear that a bona fide party who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that party would be

able to establish that fact under this amendment and forfeiture would not occur." Remarks of Senator Nunn, 124 Cong. Rec. 23057 (July 27, 1978), cited in *United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618, 625 (3d Cir. 1989). Senator Culver of Iowa stated "that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an innocent party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect the individual who obtains ownership of proceeds with no knowledge of the illegal transaction." Remarks of Senator Culver, 124 Cong. Rec. 23056 (July 27, 1978), cited in *United States v. Parcel of Real Prop. Known as 6109 Grubb Road, Millcreek Tp., Erie County, Pa.*, 886 F.2d 618, 625 (3d Cir. 1989).

Both of these statements addressed a situation in which the illegal activity occurred prior to the time that the innocent owner acquired his interest in the property. Senator Nunn described a bona fide owner who had no knowledge that his property was "derived" from an illegal transaction. Senator Culver thought the provision protected an owner who obtains "ownership of proceeds with no knowledge of the illegal transaction." For the government's position to be correct, both of these Senators had to completely misunderstand the effect of the amendment they were supporting.

The United States attempts to avoid the impact of this legislative history simply by asserting that it is inconsistent with the language of the innocent owner provision, but fails to offer a convincing explanation why Congress would have included the innocent owner language in a provision authorizing the forfeiture of the proceeds of illegal activity, as section 881(a)(6) does, if not to protect subsequent bona fide purchasers for value. Given what it means for property to be the "proceeds" of illegal activity, a forfeiture of proceeds is far more

likely to involve innocent claimants who acquired their interest in the property subsequent to the date of the illegal activity than it is to involve claimants who somehow acquired an interest in the property prior to the time that it became the proceeds of illegal activity.⁶

The United States also contends that the distinction between the innocent owner provision in civil forfeiture and its counterpart in criminal forfeiture demonstrates that Congress intended to protect subsequent bona fide purchasers for value in criminal forfeiture proceedings but not in civil forfeiture proceedings. The difficulty with the government's argument is that it directly conflicts with the legislative history of section 881(a)(6) discussed above. Furthermore, the government offers no rational explanation why Congress would have intended to protect subsequent bona fide purchasers for value in criminal forfeiture proceedings while denying the same protection to such claimants in civil forfeiture proceedings.⁷ Absent some indication of a rational purpose be-

⁶ The United States describes a hypothetical situation in which an innocent owner lends money to a criminal who then uses the funds to bankroll a drug transaction. When a bank account representing the proceeds of the transactions is seized, the innocent owner could assert a claim of innocent ownership to the account. The United States claims this hypothetical represents "an important class of property owners." See U.S. Br. at 27 n.8. Even assuming for the sake of argument that this hypothetical represents an "important class of property owners," there is no evidence that Congress had this and only this class of innocent owners in mind when it enacted the innocent owner provision in section 881(a)(6). Furthermore, common sense suggests that the number of persons in the government's hypothetical class is small compared to the numbers of subsequent bona fide purchasers that are likely to be affected by a forfeiture of proceeds.

⁷ The government hypothesizes that Congress intended the criminal forfeiture innocent owner provision to ensure that "this criminal sanction visits hardship on the convicted defendant and not others unlikely to be involved in the offense or in sheltering the defendant's property. [Citation omitted] That rationale does not necessarily apply to civil forfeitures, which have always regarded

hind such a distinction, the more reasonable conclusion to be drawn from the corresponding criminal forfeiture innocent owner provision is that Congress intended to provide the same protection in both civil and criminal forfeiture proceedings.

Nor does it bolster the government's argument to emphasize the harshness of forfeiture at common law and the fact that early forfeiture cases, such as *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814), held that the innocence of the owner was no defense to forfeiture. See U.S. Br. at 2. It was precisely to ameliorate the harshness of the common law rule that Congress enacted statutory innocent owner protections. Furthermore, if Congress enacted the civil forfeiture innocent owner provision solely for the purpose of protecting innocent claimants who acquired their interest in the property prior to the time of the illegal activity giving rise to the forfeiture—which is the government's position—then Congress engaged in a largely futile act. As this Court's decision in *United States v. Stowell*, 133 U.S. 1 (1890), clearly demonstrates, the common law relation back doctrine did not defeat the rights of a claimant who acquired his interest in the property prior to the time of the illegal activity giving rise to the forfeiture. See 133 U.S. at 19-20 ("It being admitted that the business of a distiller was not carried on with the mortgagee's permission or connivance, and that he did not even know that a still had been set up on the premises, it follows . . . that the mortgage is valid as against the United States, and that, so

the property as the 'offender.' " U.S. Br. at 32-33 n.11. This proposed explanation simply repeats the distinction between civil and criminal forfeiture and does not explain why Congress would want to protect innocent claimants in criminal forfeiture proceedings but not in civil forfeiture proceedings. Under the government's construction, civil forfeiture certainly will "visit hardship" on innocent owners "unlikely to be involved in the offense." If Congress simply wanted to leave innocent persons to their fate at common law civil forfeiture, there was no reason for it to adopt an innocent owner provision at all.

far as concerns the real estate, the judgment of condemnation must be against the equity of redemption only.").

The government is properly concerned that confederates of criminals will attempt to use innocent owner provisions to shield property from forfeiture. It is unnecessary, however, to cut off the rights of every innocent claimant who acquired his interest in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture—including innocent bona fide purchasers for value—in order to prevent criminals from shielding their assets through confederates. It is well-established that once the government establishes probable cause that property is subject to civil forfeiture, the burden of proof shifts to the putative innocent owner to prove his innocence. See, e.g., *United States v. Parcel of Land and Residence Located Thereon at 5 Bell Rock Rd., Freetown, Mass.*, 896 F.2d 605, 609 (1st Cir. 1990); *United States v. Premises and Real Prop. at 4492 S. Livonia Rd., Livonia, N.Y.*, 889 F.2d 1258, 1267 (2d Cir. 1989); *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1160 (2d Cir. 1986); *United States v. All That Ground Known As 2511 E. Fairmont Ave., Baltimore, Md.*, 772 F. Supp. 1273, 1277 (D. Md. 1989). It appears unlikely that those who are associated closely enough with criminals to receive substantial gifts of money or property will be able to discharge their burden of proving that they had no knowledge of the illegal activity. There is no reason to assume that factfinders will be unable to determine when claimants are "innocent" under the standard established by section 881(a)(6).⁸

⁸ The government is troubled that donees may succeed in qualifying as innocent owners. It is not unreasonable for Congress to have made the judgment, however, that truly innocent donees should not suffer the hardship of having to repay to the United States donations that had already been received, budgeted and spent. The criminal no longer has the use of his money, and while the United States would be unable to recover the assets for the forfeiture fund, Congress may have viewed that as the preferable alternative to

C. Administrative Remission and Mitigation Procedures Are No Substitute for the Statutory Innocent Owner Defense.

The United States argues that the Court need not be concerned if the relation-back doctrine is interpreted as defeating the right of an innocent claimant who acquires an interest in the forfeited property after the occurrence of the illegal act giving rise to forfeiture, because an innocent bona fide purchaser should be able to recover the forfeited interest in the property by petitioning the Department of Justice for remission and mitigation. U.S. Br. at 35-41; *see* 21 U.S.C. § 881(d) (1988); 28 C.F.R. §§ 9.1-9.7 (1991). The administrative authority to remit or mitigate forfeiture, however, is not a satisfactory remedy for an innocent bona fide purchaser, for a number of reasons.

First, it is well-established that an innocent claimant has no right to remission or mitigation; the decision whether to grant remission or mitigation is entirely a matter of grace, normally not subject to judicial review.⁹ Decisions on remission and mitigation are made by the

recovering funds from innocent donees. Criminals are not typically in business in order to donate funds to recognized charities, and the rights of subsequent bona fide purchasers for value should not be sacrificed in order to preclude the possibility that a criminal could distribute the proceeds of his illegal activity to truly innocent donees.

⁹ *See, e.g., Ivers v. United States*, 581 F.2d 1362, 1371 (9th Cir. 1978); *United States v. One 1973 Buick Riviera Auto, VIN 4Y87U3H548756*, 560 F.2d 897 (8th Cir. 1977); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). The Court has suggested that in an extreme case judicial review of the administration of remission and mitigation may be available. *See United States v. United States Coin and Currency*, 401 U.S. 715, 721 (1971). It is unclear whether this judicial review extends beyond the authority to order the relevant administrative official to consider remission petitions rather than rejecting the petitions wholesale. *See United States v. Edwards*, 368 F.2d 722 (4th Cir. 1966).

Director of the Office of Asset Forfeiture, a non-judicial official in the Criminal Division of the Department of Justice. *See* 28 C.F.R. § 9.3(d) (1991); United States Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program* (1990) at 6, 13. Assets resulting from forfeitures are deposited in the Assets Forfeiture Fund, administered by the Department of Justice, and payments to innocent persons in connection with remission and mitigation are also made from this fund. *See* U.S. Br. at 38. The remission regulations promulgated by the Department of Justice provide explicitly that even when a claimant has satisfied the standards for obtaining remission set forth in the regulations, the Department may still refuse to grant a complete recovery to the claimant. The regulations state: "In addition to having the discretionary authority to grant relief by way of complete remission of forfeiture, the determining official may, in the exercise of discretion, mitigate forfeitures of seized property. Mitigation may also be granted when the minimum standards for remission have been satisfied but the overall circumstances are such that, in the opinion of the determining official, complete relief is not warranted." 28 C.F.R. § 9.5(c) (1991) (emphasis added).

A procedure in which a claimant can satisfy the standards for remission but nevertheless be denied relief is not a satisfactory substitute for statutory protection of innocent bona fide purchasers. Nevertheless, according to the government's argument, innocent mortgage lenders and other bona fide purchasers for value should be content to have their petitions for remission heard by a non-judicial official, whose decisions are unreviewable, in the same agency that is responsible for prosecuting forfeiture actions and for administering the special fund in which the proceeds of forfeiture are deposited. It is no reflection on the ethics and professionalism of the officials of the Department of Justice to say that no official should be expected to perform such different functions at the same time, without the benefit of judicial review.

Secondly, an innocent mortgage lender is likely to receive a lesser recovery under the Department's remission and mitigation regulations than the lender would be entitled to receive under statutory innocent owner provisions. Recent cases have established that an innocent lender who qualifies as an innocent owner under 21 U.S.C. § 881(a)(6) is entitled to recover the outstanding principal balance of the loan, any unpaid interest that accrues up to the date the loan principal is repaid, and reasonable costs and attorney's fees incurred in protecting its lien in the forfeited property. See *United States v. Federal National Mortgage Ass'n*, 946 F.2d 264, 266-67 (4th Cir. 1991). In contrast, the remission and mitigation regulations prior to their amendment in 1987 did not permit recovery of interest accruing after the property was seized. See *United States v. 8.4 Acres of Land Located in Little River Tp., Horry County, S.C.*, 648 F. Supp. 79, 83 (D.S.C. 1986), *aff'd mem.*, 823 F.2d 549 (4th Cir. 1987); *United States v. One Piece of Real Estate, Described in Part As: 1314 Whiterock and Improvements, San Antonio, Bexar County, Tex.*, 571 F. Supp. 723 (W.D. Tex. 1983). Even today the regulations do not allow recovery of interest up to the date the principal is repaid, but instead allow recovery of unpaid interest only through the last full month prior to the granting of the remission petition.¹⁰ The remission regulations also do not permit an innocent mortgage lender to recover its reasonable attorney's fees and costs. See 28 C.F.R. § 9.2(h) (1991).¹¹

¹⁰ The Department of Justice remission regulations provide that a lienholder may recover its "net equity" in forfeited property. 28 C.F.R. § 9.7(b) (1991). The regulations define "net equity" as "the amount of a lien-holder's monetary interest in property subject to forfeiture. Net equity is to be computed by determining the amount of unpaid principal and unpaid interest at the time of seizure, and by adding to that sum unpaid interest calculated from the date of seizure through the last full month prior to the date of the notification granting the petition." 28 C.F.R. § 9.2(h) (1991).

¹¹ The government refers to the recently established policy of expedited forfeiture settlement for mortgage holders, see U.S. Br. at

Third, the remission regulations require a claimant to satisfy a higher standard in order to obtain recovery than an innocent owner is required to show under the statutory innocent owner standard. The regulations provide for remission when the petitioner, *inter alia*, has "a valid, good faith interest in the seized property," had no knowledge of the illegal activity, and "had taken all reasonable steps to prevent the illegal use of the property." See 28 C.F.R. § 9.5(b) (1991). This standard for recovery under the remission regulations is derived from the standard for relief under the due process clause suggested by the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). That is, the Fifth Amendment's due process clause shields an innocent owner's property from forfeiture if the innocent owner can establish "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689-90. The Department's remission and mitigation regulations simply provide what the Constitution requires.¹²

39, but fails to explain that in order to be eligible to benefit from this policy, a mortgage lender must establish that it qualifies as an innocent owner "as defined by the applicable forfeiture statute and case law." See United States Dep't of Justice, *Expedited Forfeiture Settlement Policy for Mortgage Holders* (April 1992) at 8. Obviously, if the government prevails in this case, mortgage lenders who acquired their interests in the property subsequent to the occurrence of the illegal activity giving rise to the forfeiture will not be innocent owners and consequently will be precluded from obtaining expedited settlements in civil forfeiture proceedings pursuant to this policy.

¹² See 28 C.F.R. § 9.5(b) (1991). The authority for remission and mitigation is provided by 19 U.S.C. § 1618 (1988), incorporated in 21 U.S.C. § 881(d) (1988). Section 1618 authorizes remission if the petitioner can show that the forfeiture "was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law" This language shows that a petitioner who establishes that he was not negligent is entitled to remission, even though the Department of

The statutory innocent owner provision applicable in civil forfeiture proceedings, however, provides a greater measure of protection to innocent owners than the Department's remission and mitigation regulations do. Claimants who establish lack of knowledge of the illegal activity giving rise to the forfeiture are not required to show that they did "all that reasonably could be expected to prevent the proscribed use" of the property. See *United States v. Lots 12, 13, 14, and 15, Keeton Heights Subdivision, Morgan County, Ky.*, 869 F.2d 942, 946-47 (6th Cir. 1989); *United States v. One Urban Lot Located at 1 St., A-1, Valparaiso, Bayamon, P.R.*, 865 F.2d 427, 430 (1st Cir. 1989); *United States v. \$10,694.00 United States Currency*, 828 F.2d 233, 234 (4th Cir. 1987) (section 881 (a) (6) innocent owner need not establish that he had done all that reasonably could be expected); *United States v. Four Million Two Hundred Fifty Five Thousand Dollars*, 762 F.2d 895, 906 n.24 (11th Cir. 1985) (section 881 (a) (6) innocent owner need not establish that he had done all that reasonably could be expected), *cert. denied*, 474 U.S. 1056 (1986); *United States v. Certain Real Prop.*, 724 F. Supp. 908, 914 (S.D. Fla. 1989) (section 881 (a) (7) innocent owner need not establish that he had done all that reasonably could be expected); *but see United States v. Premises Described as Route 2, Box 61-C, Crossett, Ark.*, 727 F. Supp. 1295, 1299 (W.D. Ark. 1990); *United States v. One Single Family Residence with Outbuildings Located at 15621 S.W. 209th Ave., Miami, Fla.*, 699 F. Supp. 1531, 1534 (S.D. Fla. 1988). Only when a claimant has knowledge of the illegal activity giving rise to the forfeiture, and therefore must establish its lack of consent to the illegal activity in order to qualify as an innocent owner, does it become necessary for the claimant to demonstrate that it took all reasonable steps

Justice regulations impose a much more difficult burden. Since remission decisions are not subject to judicial review, the inconsistency between the governing statute and the regulations has gone unremedied.

to prevent the illegal use of the property. *United States v. Certain Real and Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991); *United States v. One Single Family Residence Located at 15603 85th Avenue North*, 933 F.2d 976 (11th Cir. 1991); *United States v. Certain Real Property and Premises Known As 418 57th Street, Brooklyn, New York*, 922 F.2d 129 (2d Cir. 1990); *United States v. 141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1017 (1991); *see also United States v. Property Identified as 908 T Street, N.W.*, 770 F. Supp. 697, 702 (D.D.C. 1991). Consequently, innocent mortgage lenders are held to a higher standard under the Department's remission and mitigation regulations than Congress itself established for innocent owners in statutory innocent owner provisions such as 21 U.S.C. § 881 (a) (6).

In sum, the informal remedy provided by the opportunity to seek remission and mitigation of forfeiture is no substitute for the statutory right provided by civil forfeiture innocent owner provisions such as 21 U.S.C. § 881 (a) (6).

II. THE INTERPRETATION OF THE RELATION-BACK DOCTRINE ADVANCED BY THE UNITED STATES VIOLATES THE DUE PROCESS CLAUSE.

The interpretation of the relation-back doctrine urged by the United States conflicts with the constitutional standard enunciated by the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974). In *Pearson Yacht*, the Court stated:

It would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent. Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that cir-

cumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Id. at 609-610 (emphasis added) (citations and footnotes omitted).

Even if a subsequent bona fide purchaser were uninformed and unaware of the wrongful activity, and also had done all that reasonably could be expected to prevent the proscribed use of the property—the *Pearson Yacht* standard—the government's interpretation of the relation-back doctrine would still defeat the innocent purchaser's claim. "It has long been an axiom of statutory interpretation that where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466 (1989) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). It was precisely for this reason that the United States District Court for the Southern District of Florida held that the claim of a mortgage lender who acquired its lien subsequent to the occurrence of the illegal activity giving rise to the forfeiture was not defeated by the relation-back doctrine. See *United States v. One Single Family Residence Located at 6960 Miraflores Ave., Coral Gables, Fla.*, 731 F. Supp. 1563, 1569 (S.D. Fla. 1990), *appeal dismissed*, 932 F.2d 1433 (11th Cir. 1991), *cert. granted on other grounds*, No. 91-767, 60 U.S.L.W. 3578 (Feb. 25, 1992).¹³

¹³ The few courts that have considered the issue are divided on whether the *Pearson Yacht* constitutional defense is available to innocent owners whose rights would otherwise be cut off by the relation-back doctrine. Compare *United States v. One 1951 Douglas DC-6 Aircraft*, 525 F. Supp. 13 (W.D. Tenn. 1979) (defense not available to subsequent bona fide purchaser whose interest was not perfected prior to the vesting of the government's interest), *aff'd*, 667 F.2d 502 (6th Cir. 1981), *cert. denied sub nom. Ernesto Zaragoza*

The government suggests that this constitutional issue can be avoided because an innocent claimant has the opportunity to seek remission. See U.S. Br. at 39 n.16. To the contrary, the remission and mitigation procedure cannot possibly be a satisfactory mechanism for adjudicating the constitutional rights of innocent claimants. In other contexts this Court has found it a violation of due process when an official acts in a judicial capacity at the same time that the fees and costs assessed by the official were used to augment his salary or accounted for a substantial part of the revenues of his jurisdiction. See *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927); cf. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). As noted above, decisions on remission and mitigation are made by the Director of the Office of Asset Forfeiture, a non-judicial official in the Criminal Division of the Department of Justice. See 28 C.F.R. § 9.3(d) (1991); United States Dep't of Justice, *Annual Report of the Department of Justice Asset Forfeiture Program* (1990) at 6, 13. Assets resulting from forfeitures are deposited in the Assets Forfeiture Fund, administered by the Department of Justice, and payments to innocent persons in connection with remission and mitigation are also made from this fund. See U.S. Br. at 38. This means that when the Director of the Office of Asset Forfeiture grants a remission petition the Fund is diminished, while a denial of remission preserves the Fund. Decisions of this type must be made by officials performing judicial functions in order to satisfy due process. See *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

Because remission is purely a matter of administrative grace, decided by a prosecuting official not subject to judicial review, this procedure is insufficient to protect

Y. v. United States, 462 U.S. 1105 (1983) with *United States v. One 1976 Chevrolet Corvette, Serial No. 1Z37L6S419778*, 477 F. Supp. 32 (E.D. Pa. 1979) (defense available to subsequent bona fide purchaser whose rights would otherwise be cut off by the relation-back doctrine).

a claimant's constitutional rights. *See, e.g., Connecticut v. Doebr*, — U.S. —, 111 S.Ct. 2105 (1991); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

The interpretation of the relation-back doctrine urged by the United States vitiates the protection provided to innocent mortgage lenders and other bona fide purchasers by the civil forfeiture innocent owner provision. If the relation-back doctrine is applied in this fashion, mortgage lenders are virtually helpless to protect their liens from forfeiture. A mortgage lender can only hope to detect the illegal activity giving rise to the forfeiture prior to making the loan and then refuse to make the loan. It is unlikely that a lender will be able to detect the illegal activity giving rise to the forfeiture prior to making the loan, however, particularly when the activity giving rise to the forfeiture is the purchase of property with the proceeds of illegal activity. Under the interpretation of the relation-back doctrine urged by the United States, a mortgage lender lacks any effective way to protect its security interest in the property. Congress intended civil forfeiture innocent owner provisions such as 21 U.S.C. § 881(a)(6) to protect innocent mortgage lenders and similar bona fide purchasers for value in such circumstances.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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